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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-21

JAMES MANNING AND WALTER HELM,

Petitioners,

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONERS

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The government's brief in opposition does not disagree that "a defendant is entitled to some protection against the danger of a court's reliance on erroneous hearsay allegations in imposing sentence" (Opp. 4). Nor does it disagree that these petitioners were sentenced following the district court's consideration of conclusory and uncorroborated anonymous charges which petitioners were precluded from probing or rebutting. Thus, the

question in dispute at this point is whether there was any justification for denying these petitioners the protection acknowledged by the government and by the decisions of other courts of appeals cited in the petition.

The government's argument is, in substance, that these petitioners may not complain about the district court's *consideration* of improper material because it is not clear from the record that the court *relied* upon that material in determining the sentence. The government infers that the improper material was given only "minimal weight" from the circumstances that (1) the sentences imposed were under the maximum; and (2) the court did not expressly indicate reliance upon the material (Opp. 5-6). In addition, the government contends — with perfect circularity — that the district court's lack of reliance can be presumed from its refusal to allow the material to be rebutted (*Id.* n.3).

Such an inferential *post hoc* justification contradicts the Seventh Circuit's recent refusal, in *United States v. Harris*, 558 F.2d 366, 274-75 (7 Cir. 1977), to "adopt a rule which will have the natural and probable effects of encouraging trial judges to avoid giving reasons for sentencing decisions and diminishing the individual offender's confidence in the fairness and objectivity of a critical step in the criminal justice process." See also Pet. 8 n.6. Surely here, as at other important stages of the criminal process, there should be a clear cut procedural rule whose applicability can be determined and understood at the time of the sentencing hearing. Compare *McCarthy v. United States*, 394 U.S. 459. As we have shown (Pet. 6-7), the Second Circuit has articulated

such a rule in *United States v. Fatico*, 2 Cir. No. 78-1003 (June 12, 1978), with which the decision below conflicts.¹

Respectfully submitted,

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¹The government's effort to distinguish *Fatico* ignores the fact that the court found both good cause for nondisclosure of the informant there and sufficient corroboration of the charge of organized crime connections. In the present case there was neither.